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Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Washington, D.C.

In The Matter Of:

Implementation of the Cable Television  
Consumer Protection and Competition  
Act of 1992

MM Docket No. 92-265

Development of Competition and  
Diversity in Video Programming  
Distribution and Carriage

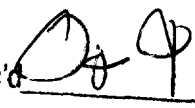
COMMENTS OF PRIMETIME 24

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## SUMMARY

Congress did not intend, in Section 628 of the 1992 Cable Act, to regulate any programming vendors that are not owned, in whole or in part, by a cable operator.

Any contrary interpretation of the Act, or its legislative history, will practically result in the singling out of one satellite broadcast programming vendor that serves less than one percent of the cable marketplace for regulation of distribution that includes wholesalers who, virtually by definition, do not compete.

Should regulations under Section 628 be made applicable to PrimeTime 24, despite its lack of integration with a cable operator, despite the fact that no distributor has ever complained of its distribution policies, and despite the fact that its wholesale distribution is currently regulated under Section 119 of Title 17 of the United States Code, the public interest in receiving broadcast television in rural and other unserved areas could be significantly harmed.

If regulation ultimately applies PrimeTime 24 as the only non-cable vendor to be affected by Section 628, the related rules should address only those areas in which its distributors actually compete and those rules should only be implemented three years after their effective date, in order to let the marketplace work to avoid unnecessary discrimination between distributors.

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#### COMMENTS OF PRIMETIME 24

##### I. Introduction

PrimeTime 24 Joint Venture ("PrimeTime 24") is a partnership that is engaged principally in the retransmission of the broadcast television signals of WABC-TV (ABC, New York), WRAL-TV (CBS, Raleigh) and WXIA-TV (NBC, Atlanta) for the benefit of C-Band home satellite dish ("HSD") owners and a small number of cable operators located throughout the states, commonwealths, trusts, territories and possessions of the United States.

PrimeTime 24 operates as a "satellite carrier" under the Satellite Home Viewer Act of 1988 (the "SHVA") when it provides signals to HSD consumers. It provides retransmission service to its cable operator customers located in the United States, as a "passive carrier."

Since its inception in 1986, PrimeTime 24 has been dedicated to the delivery of network programming to HSD households that were then, and are now, unserved by any other distribution technology. Currently, over 400,000 HSD households receive network programming from PrimeTime 24 in locations unserved by traditional distribution media commonly referred to as "white areas".<sup>1</sup>

Early in the development of PrimeTime 24, it became clear that some cable operators located throughout the United States were also in need of satellite delivered network programming due to the absence or inadequacies of the signals of local affiliates of ABC, CBS and NBC. PrimeTime 24 began serving those cable operators some time after it commenced service to the HSD marketplace.<sup>2</sup>

Originally, PrimeTime 24 offered its retransmission services to cable operators in unserved areas at rates similar to those used in the sale of signals to HSD owners. PrimeTime 24 had no other rates to offer, since it never anticipated serving the cable marketplace. The original wholesale rates were not deemed acceptable as a result of a number of commercial realities, including an inability of operators to increase retail cable rates to accommodate wholesale charges at that level. In the end, PrimeTime 24 and its current cable operator customers reached agreement for the delivery of network service at rates that are lower than wholesale rates in the HSD distribution chain.<sup>3</sup> The receipt of that incremental revenue from cable operators in unserved areas has been critical to PrimeTime 24 during its development as one of the only surviving services dedicated to serving the HSD marketplace.<sup>4</sup>

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<sup>1</sup>The SHVA authorizes "satellite carriers" such as PrimeTime 24 to sell subscriptions to network retransmission service to HSD owners residing in "unserved households", i.e. generally speaking, residences that do not receive the signal of a given network or networks from broadcast affiliates or cable operators.

<sup>2</sup>Approximately 270,000 of all domestic cable homes served by PrimeTime 24 are located in Puerto Rico where there are no broadcast television affiliates of any of the networks. Virtually every cable operator in Puerto Rico contracts to carry all three of the PrimeTime 24 delivered signals of network affiliates.

<sup>3</sup>Differences in the cost of distribution through cable and HSD wholesalers ultimately accounted for a significant portion of the differences in the current charges to each group of distributors, i.e. PrimeTime 24 pays copyright royalties for all sales to HSD subscribers whereas cable operators pay cable compulsory license fees for the use of PrimeTime 24 transmissions; PrimeTime 24 pays for encryption and authorization of the signals for distribution to the HSD universe, an unnecessary expense in the service of cable subscribers alone; PrimeTime 24 markets the signals throughout the HSD industry and cable operators provide the only marketing necessary within each cabled area; and so on.

<sup>4</sup>Despite the fact that the total numbers of HSD subscribers and cable subscribers that receive the signals of PrimeTime 24 are relatively equal, incremental gross revenues received from cable operators are substantially less than the revenues PrimeTime 24 receives from HSD consumers it was formed to serve.

## II. Purpose of Regulation Under Section 628 of the Communications Act

Congress was very clear in describing the overall purpose of regulation under Section 628 in paragraph (a) of that provision:

(a) Purpose.- The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.

The Commission correctly focuses on that paragraph at the outset of its analysis in the Notice in this proceeding. The express purpose of Congress in enacting Section 628 must be kept in mind at every turn in the development of regulations under it.

Distribution of network broadcast signals to unserved areas is the hallmark of PrimeTime 24 existence. PrimeTime 24 was formed to serve disenfranchised television households located in the rural regions of the country. Cable subscribers who were not able to receive selected network signals were quickly added to the list of PrimeTime 24 beneficiaries, as noted above.

Ever since PrimeTime 24 commenced operation, its essential delivery of network signals has been characterized by ready and reasonable access to its service by distributors of all kinds. Virtually every package of satellite delivered programming contains an offering of PrimeTime 24 signals to those who are in need of its service. The development of the HSD industry has been aided immeasurably by the wide and competitive availability of PrimeTime 24 signals.

In sum, the delivery of network programming by PrimeTime 24 and the HSD industry it serves is precisely the kind of distribution that Congress intended to promote not unnecessarily regulate. For the reasons mentioned in detail below, PrimeTime 24 respectfully submits that Section 628 was not intended to result in modification of its current distribution practices and policies.

### III. Regulation of Vendors That Are Not Vertically Integrated Is Not Warranted

#### A. Congress Did Not Intend to Regulate Satellite Broadcast Programming Vendors That Are Not Affiliated With Cable Operators

The Commission correctly observed that the content of mandated regulation described in Section 628(c)(2) refers to satellite broadcast programming vendors in which a cable operator has an "attributable interest" in substantial part.<sup>5</sup> That Congressional focus on vertically integrated companies is plain and further confirmed in the legislative history of the 1992 Cable Act.<sup>6</sup> Any lack of reference in Section 628 to vertical integration with regard to satellite broadcast programming vendors is of no regulatory significance.

A review of the legislative predecessors to the 1992 Cable Act sheds further light on the references to satellite broadcast programming vendors in Section 628. The original text of S. 12 proposed regulation of all "satellite carriers" under a separate paragraph of that Bill, apart from a provision regulating distribution of programming by video programmers in which a cable operator has an "attributable interest."<sup>7</sup>

H.R. 4850, the precursor to the 1992 Cable Act in the House, only provided for the regulation of distribution of programming by and between cable operators and satellite cable programming vendors in which a cable operator had an "attributable interest."<sup>8</sup>

When the differences in the Bills were resolved in Conference, regulation of all satellite carriers was dropped and replaced with reference to satellite broadcast programming vendors in which a cable operator has an "attributable interest" for the most part.

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<sup>5</sup>Paragraphs (A),(C) and (D) of Section 628 (c)(2).

<sup>6</sup>Senate Report, page 24 and House of Representatives Report, pages 41-45 (NPRM fn 14)

<sup>7</sup>Sections 641 and 640 of S. 12 respectively.

<sup>8</sup>Section 628 of H.R. 4850.

In explanation of the compromise language of Section 628 related to the new term "satellite broadcast programming vendor", the Conference Committee stated:

The conference agreement clarifies that programming distributed by satellite broadcast programming vendors (fixed service satellite carriers) is covered by this section. Satellite broadcast programming vendors are to be held to the same standards as the programming vendors to whom this section applies. (Emphasis added)  
(Conference Committee Report, page 73)

The Conference Committee Report reveals an intent to regulate broadcast vendors in the same manner that Congress intended to regulate satellite cable programming vendors, i.e. to the extent cable operators have an "attributable interest" in each, satellite *cable* programming vendors and satellite *broadcast* programming vendors alike. In doing so, the Conference Committee and Section 628 of the 1992 Cable Act left regulation of all satellite carriers, i.e. all satellite broadcast programming vendors whether or not vertically integrated, to the provisions of Section 119 of Title 17 of the United States Code. There, all satellite broadcast programming vendors are now, and will be, subject to prohibitions against discrimination in the distribution of their signals as a result of the passage of the Satellite Home Viewer Act of 1988.

That reading of the Conference Committee Report is borne out by any reasonable extension of the regulation Congress sought to introduce to the multichannel video market. As already noted, the purpose of Congress in passing Section 628 was to promote competitive distribution of cable and broadcast programming to the unserved and to spur the development of technology. In that section, Congress clearly chose to focus the regulatory aim of the Commission on the concerns it had with the opportunity of the cable industry to impact delivery of programming to its competitors.<sup>9</sup>

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<sup>9</sup>Senate Report, pages 24-29.

The singular focus by Congress on vertically integrated companies is further confirmed by the omission of cable program suppliers that do not have any cable "attributable" ownership.<sup>10</sup> The glaring omission of non-vertically integrated cable vendors in Section 628 is evidence of the intent of Congress that only vertically integrated entities be regulated within the realm of Section 628. In fact, if the Commission does not ultimately agree with the position espoused by these Comments, it will then be singling out PrimeTime 24 as the only cable or broadcast programming vendor in which cable does not have an "attributable interest" to be regulated under the 1992 Cable Act, as explained in paragraph B. below. There is no foundation or need for such unique treatment.

In stark contrast to the vertically integrated companies Congress had in mind when it passed Section 628, PrimeTime 24 represents the new entrant to the multichannel video marketplace that Congress wanted to help in enacting that section. PrimeTime 24 is not a multi-layer corporate juggernaut that serves millions of subscribers and leaves other distributors and competing technologies swooning in its wake. It is a modest venture that provides an extended network service, at the fringes of the marketplace, to a legally-truncated portion of the HSD universe and less than one percent of the country's cable households. It has no ability to take advantage of one distribution technology at the expense of another, even if it wanted to do so. Its service is normally available for free over-the-air for all to see<sup>11</sup>. It competes directly with an affiliate of the largest cable operator in the country,<sup>12</sup> and it is currently retransmitting signals under a statutory license that has less than two years until its scheduled expiration.<sup>13</sup> Any regulation of its activities is unintended by Congress and unnecessary in the marketplace.

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<sup>10</sup>One of the most difficult program services to secure for distribution by technologies that compete with cable is ESPN, a service that is not owned or controlled by cable interests. Repeated requests for access to ESPN, arguably the most popular cable programming, by PrimeTime 24 for use of ESPN in a package of programming sold to HSD owners by PrimeTime 24 have been rejected.

<sup>11</sup>The Commission wisely notes in footnote 20 of the NPRM that satellite broadcast programming vendors sell retransmission service of programming they do not own. Under SHVA, anyone may uplink competing broadcast signals at any time. As a result, new regulatory oversight is not needed in an area of that is subject to existing regulation and instant competitive entry.

<sup>12</sup>Netlink USA, an affiliate of Tele-Communications Inc., offers signals of the three broadcast networks to HSD owners in packages of programming that include virtually every cable programming service.

<sup>13</sup>Section 119 of Title 17 of the United States Code enacted by the SHVA is scheduled to expire on December 31, 1994.

**B. The Only Non-Vertically Integrated  
Broadcast Vendor Has Never Been Accused  
of Unfair Programming Distribution Policies**

PrimeTime 24, is the only broadcast vendor that does not have any affiliation with a cable operator. In addition, PrimeTime 24 has never even been accused of engaging in discriminatory pricing practices in the marketplace. It is unreasonable to conclude, therefore, that Congress intended to go out of its way to regulate an entity: that welds no vertically integrated club in the marketplace; that deals with virtually all distributors through policies that have offended no one; and that remains subject to existing price discrimination law applicable to all satellite carriers.

**C. Public Interest in the Multichannel  
Video Market Could Be Harmed Not  
Promoted By Unnecessary Regulation**

If the harshest of regulations were imposed under Section 628 and PrimeTime 24 were required to "equalize" wholesale pricing between HSD and cable distributors, PrimeTime 24 would be forced to increase pricing to the cable operators rather than decrease HSD wholesale rates. It would have no other choice in its circumstances as a supplier to a relatively minute number of cable households that yield only incremental revenues to the bottom line of the business.

The impact of that increase to the cable community served by PrimeTime 24 is uncertain, but some operators may be forced to discontinue receipt of network service as a result. The loss of any income to PrimeTime 24 in its incremental cable marketplace will put upward pressure on wholesale and retail rates in its HSD universe. In the end, some households that depend exclusively on PrimeTime 24 for the delivery of network service could lose that delivery or pay increased rates for the privilege. No public purpose can be conceived that would offset that result, given the circumstances and history of this multichannel video competitor. That is especially true since the distributors served by PrimeTime 24 in the respective HSD and cable marketplaces do not overlap; for the most part, HSD distributors of PrimeTime 24 services do not

compete with cable operator customers of PrimeTime 24 solely as a function of the particular marketplace served by PrimeTime 24.<sup>14</sup>

#### IV. Scope of Regulation Under Section 628

If the Commission ultimately disagrees with the positions taken in the foregoing, PrimeTime 24 respectfully suggests that the purpose of Section 628 cannot thereafter be ignored in the formulation of regulations made applicable to it. To that extent, the Commission recognition of the purpose of Section 628 bears remembering.<sup>15</sup> The distribution of programming by a multichannel distributor such as PrimeTime 24 that personifies diversity in the marketplace; single-handedly increases the availability of network broadcast programming to rural and unserved populations of the country; and that assists in the development of the real competition to cable, should be promoted not unnecessarily hindered under Section 628.

Two steps can be taken by the Commission to avoid overreaching regulation in violation of the express purpose of Section 628 for all those who are affected by regulation thereunder. They involve the element of harm in the marketplace as a part of the analysis required by that Section<sup>16</sup> and the effective date of enforcement of future regulations under that Section<sup>17</sup>.

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<sup>14</sup>By the express terms of SHVA, PrimeTime 24 delivered signals may only be purchased by HSD subscribers in "white areas", as noted above. One of the elements of determining the eligibility of potential HSD customers in the "white areas" is an absence of subscription to local cable service. Areas served by cable operator customers of PrimeTime 24 are therefore very likely to be distinct from eligible markets for HSD distribution by definition. As a result, distribution territories of cable and HSD distributors of PrimeTime 24 signals are territorially unique, as a function of the terms of the current statutory license in Section 119 of the Copyright Act. In addition, the vast majority of cable subscribers served by PrimeTime 24 are in the Caribbean, a region not served by existing HSD wholesalers.

<sup>15</sup>Section 628(a).

<sup>16</sup>Paragraph 11 of the NPRM.

<sup>17</sup>Paragraph 27 of the NPRM.

**A. Regulation of Vendors Should Be  
Limited to the Geographic Areas in Which  
Multi-Distributor Competition Exists**

The Commission correctly notes in Paragraph 11 of the NPRM that Section 628 requires regulation to be focused on "unfair" activity that results in "harm" in the multichannel video market. The harm Congress had in mind was the potential for favored treatment of cable operators or program suppliers resulting from their ownership ties with each other. As a result, the suggestion by the Commission that regulation be limited to areas in which cable operations that give rise to the attributed ownership exist, is well taken. If the opportunity for favored treatment exists at all, it will blossom there and probably nowhere else.

If PrimeTime 24 is to be subjected to any form of regulation under Section 628, it should be treated no more harshly than vendors in which cable operators have an "attributable interest." PrimeTime 24 should only face interference with HSD and cable wholesale rates in marketplaces where it serves competing HSD and cable distributors. No multichannel distributor should be allowed to take advantage of differences in prices that result in marketplaces formed without its involvement and in which it does not compete. The opportunities for unfair treatment discussed ad nauseam in the legislative record of the 1992 Cable Act exist only where there is actual head-to-head competition. Competitive forces are not promoted, or even affected, by regulation elsewhere.

**B. Implementation of Regulation  
Must Be Postponed to Avoid  
Discrimination Between Competitors**

PrimeTime 24 could theoretically have to increase its rates applicable to the sale of its signals to cable operators, if none of the foregoing suggestions contained in these Comments are followed. As noted above, access to network programming could be in jeopardy in some cases as a result of such price increases.

Any institution of regulation of vendor sales under Section 628 should be phased in to avoid unfairly impacting either the distributors that happen to have an agreement with an "early" termination date or a bargain that allows for price increases on some

terms. Instead, the Commission should establish a date in the future on which compliance with Section 628 regulations will be mandated. Prior to that date, parties involved will then be able to adjust in the marketplace to accommodate for change in the least disruptive and least discriminatory way. A transition period of at least three years after the effect of any new regulation needs to be installed to allow parties to renegotiate where necessary and provide for the even introduction of that regulation in future agreements as current contracts expire.

As noted by the Commission, Section 2(b)(2) of the 1992 Cable Act requires that the marketplace be relied on to the "maximum extent feasible" to achieve availability of video programming for all. This is an area in which the Commission should allow the marketplace to work to implement rules in ways that assure continued availability of programming for all.

## V. Conclusion

The legislative record of the 1992 Cable Act does not expressly require or suggest that regulation of the distribution of video programming by any vendor that has no ownership connection with cable interests is either necessary or intended under Section 628 of the Act. If any such regulation is imposed, the Commission should limit applicable rules to the geographic areas in which vendors serve more than one distributor and customers of more than one distribution technology. It should also enforce such regulation only after a three year transition period, so that the marketplace can fairly accommodate such a change.

Respectfully submitted,  
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